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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL  
ADVOCATES, a non-profit corporation,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, A United States Government  
Agency, NATIONAL MARINE FISHERIES  
SERVICE, a part of the National Oceanic and  
Atmospheric Administration, a part of the  
United States Department of Commerce,

Defendants,

v.

STATE OF OREGON, and NORTHWEST  
PULP AND PAPER ASSOCIATION,

Intervenor-Defendants.

Case No. 3:05-cv-01876-HA

STATE OF OREGON'S SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF THE  
FEDERAL DEFENDANTS' POSITION

### **BACKGROUND**

On July 26, 2010, the Federal Defendants filed a *Motion to Remand Case to Agency Without Vacatur*.<sup>1</sup> Plaintiff opposed the motion,<sup>2</sup> and on August 31, 2010, the Court ordered the parties in this matter to confer and file a joint status report regarding the conditions of a court-ordered remand. The Court ordered the parties to confer on whether they could stipulate to the conditions of a remand that would result in neither serious disruptions to affected industries nor prejudice to those who would be affected by the continued maintenance of the status quo. The Court suggested conditions of remand, including partial vacatur, interim changes to the incidental take statements, interim modifications to the water temperature standards, and the possible admission of error by Federal Defendants. Finally, the Court ordered that if the parties could not agree to a conditional remand, the Court would take the Federal Defendants' *Motion to Remand Case to Agency Without Vacatur* under advisement.<sup>3</sup>

The parties could not agree on the terms of a remand. Thus, on October 8, 2010, the parties submitted to the Court a Joint Status Report that stated as much.<sup>4</sup> On October 12, 2010, the Court ordered the parties to provide supplemental briefs on the issue of whether the matter should be remanded to the agency without vacatur.<sup>5</sup> This is the State of Oregon's supplemental brief on that point.

### **STATE OF OREGON'S POSITION**

The State concurs with the position of the Federal Defendants. In addition, the State's primary concern regarding any action taken by the Court on the motion for remand is that Oregon's current water quality standards remain in effect in their entirety for the present time. Oregon's current water quality standards are the bases for the State's implementation of other

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<sup>1</sup> See, Court Docket, Document Number 224.

<sup>2</sup> *Id.*, Document Number 228.

<sup>3</sup> *Id.*, Document Number 233.

<sup>4</sup> *Id.*, Document Number 240.

<sup>5</sup> *Id.*, Document Number 241.

Clean Water Act programs, including the Total Maximum Daily Load, National Pollutant Discharge Elimination System and Clean Water Act section 401 certification programs.

The State believes that the current standards are more protective of fish species than earlier iterations of the Oregon's water quality standards and, if the Court were to set aside the current standards, some prior version of the standards presumably would become effective. If that occurred, the State believes that its Clean Water Act programs would not be as protective of fish species.

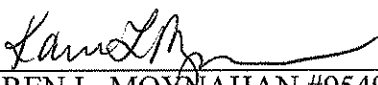
### CONCLUSION

The State of Oregon respectfully requests that the Court grant the Federal Defendants' motion, and order that Oregon's current water quality standards remain in effect in their entirety until this litigation is resolved or new standards are adopted.

DATED this 19<sup>th</sup> day of October, 2010.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 19 2010, I served the foregoing STATE OF OREGON'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE FEDERAL DEFENDANTS' POSITION upon the parties hereto by the method indicated below, and addressed to the following:

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